



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1998

Mr. Gregory T. Simpson
Director, Employment and
Administrative Law Section
Texas General Land Office
Legal Services Division
1700 N. Congress Avenue
Austin, Texas 78701-1495

OR98-1859

Dear Mr. Simpson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#117242.

The Texas General Land Office (the "GLO") received a request for information relating to the sale of an area of land known as "Paseo del Este." Specifically, the requestor seeks:

1. each Qualification Form (Exhibit E to the Solicitation) received by the GLO in response to the Solicitation, including, all parts of the Qualification Form, and any information, addenda, exhibits, and other similar materials, if any, accompanying each such Qualification Form;
2. the information entered on the docket of the School Land Board on the date of the sale of the Property as provided in Section 51.059 of the Natural Resources Code.

You indicate that the GLO will release the docket information sought in request two. You also state that you will release the Qualification Form sought in request one except for Exhibit E of the form. Exhibit E requires the bidder to identify a bank deposit or other readily available asset of at least \$1,000,000.00, and to identify the bank, a bank contact, and the type of account or asset. You argue that the information in Exhibit E is excepted from required public disclosure by section 552.110 of the Government Code.

Since the property and privacy rights of third parties may be implicated by the release of the requested information here, this office notified B&G/Sunrise Joint Venture (B&G/Sunrise), Hacienda Group, Ltd. (Hacienda), El Paso Community Partners (EPCP), The Mesa Group IV, Ltd. (Mesa), and Mr. Charles H. Foster about the request for information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

In addition to arguing that Exhibit E of the Qualification Form is excepted from disclosure, B&G/Sunrise and Mesa contend that other information contained within the Qualification Form should not be released. The GLO does not seek to withhold this additional information from the requestor. Consequently, the GLO does not seek a decision from this office regarding release of this information. Gov't Code § 552.301; Gov't Code § 552.305 (governmental body may seek attorney general decision when third party privacy or property interests may be involved). This ruling, therefore, does not address the propriety of the release of any information other than that contained in Exhibit E of the Qualification Form. Cf. *Morales v. Ellen*, 840 S.W.2d 519, 523 (Tex. App.--El Paso 1992, writ denied) (language of section 552.305(b) of the Government Code is permissive and third party need not seek relief from attorney general before claiming interest in courts).

Three of the notified parties argue that sections 552.101 and 552.104 of the Government Code except the requested information from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." After reviewing the submitted materials and arguments, no party has pointed to a statute or other provision, nor are we aware of one, that makes the requested information confidential in the hands of the GLO. Furthermore, section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the GLO does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Mr. Foster, however, argues that his financial information may be withheld based on a right of privacy. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Mr. Foster explains that after furnishing the requested information to the GLO, he decided not to bid on the solicitation at issue. After examining the arguments before this office, we find that in this case, the GLO must withhold

Mr. Foster's Exhibit E information. Open Records Decision Nos. 600 (1992) (personal financial information not relating to the financial transaction between an individual and a governmental body must be withheld under privacy), 545 (1990). We conclude that only the information submitted by Mr. Foster may be withheld based on section 552.101. Open Records Decision Nos. 600 (1992) (A corporation or a business entity may not claim common law privacy.), 554 (1990), 192 (1978).

Finally, the GLO, B&G/Sunrise, and Mesa raise section 552.110 as an exception to disclosure of the information at issue. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its]

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

The GLO initially argues that the release of the requested information would impair the agency's ability to obtain the financial information in the future. The GLO states that "[b]idders such as those here, who are faced with the prospect of releasing details of their financial resources to their competitors, may refuse to provide such details or may forego bidding on state property rather than risk compromising their competitive position." You explain, however, that the bidders in this solicitation were required to prepare the information submitted in Exhibit E. It is our understanding that without the financial information, the potential bidder would not have been considered for the sale contract. The information was required to be submitted. Thus, we do not believe that you have shown the applicability of the impairment prong in this instance. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (no impairment where information was required for bid or contract; contractors "will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right"); *McDonnell Douglass Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316; (D.D.C. 1995); see *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984, 113 S.Ct. 1579 (1992). See generally OFFICE OF INFORMATION & PRIVACY, UNITED STATES DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (1997) 149-152, 156-161, n. 142 (discussing "confidential" information under *Critical Mass* and impairment prong under *National Parks*).

Finally, both B&G/Sunrise and Mesa argue that their financial information must be withheld as confidential trade secret or commercial or financial information. After

competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

examining the submitted arguments, we do not believe that either party has established that its information must be withheld. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 (1990) at 3. Additionally, because Hacienda and EPCP did not respond to our notification, neither has established that their information is protected. Gov't Code § 552.305; ORD 639 at 4, 552 at 5. The information in Exhibit E concerning B&G/Sunrise, Hacienda, EPCP, and Mesa must, therefore, be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID# 117242

Enclosures: Submitted documents

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